

Supreme Court, U.S.  
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No. 89-1559

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STEVE ESTES,  
Petitioner,

v.

CITY OF MOORE, OKLAHOMA; MOORE PUBLIC WORKS  
AUTHORITY; ROBERT SWANAGON, individually  
and as City Manager of the City of Moore,  
Oklahoma and Manager of the Moore Public  
Works Authority; ODELL MORGAN, individually  
and as Chairman of the Personnel Board of  
the City of Moore, and CHARLES THOMPSON,  
individually and as member of the Personnel  
Board of the City of Moore, Oklahoma,

Respondents.

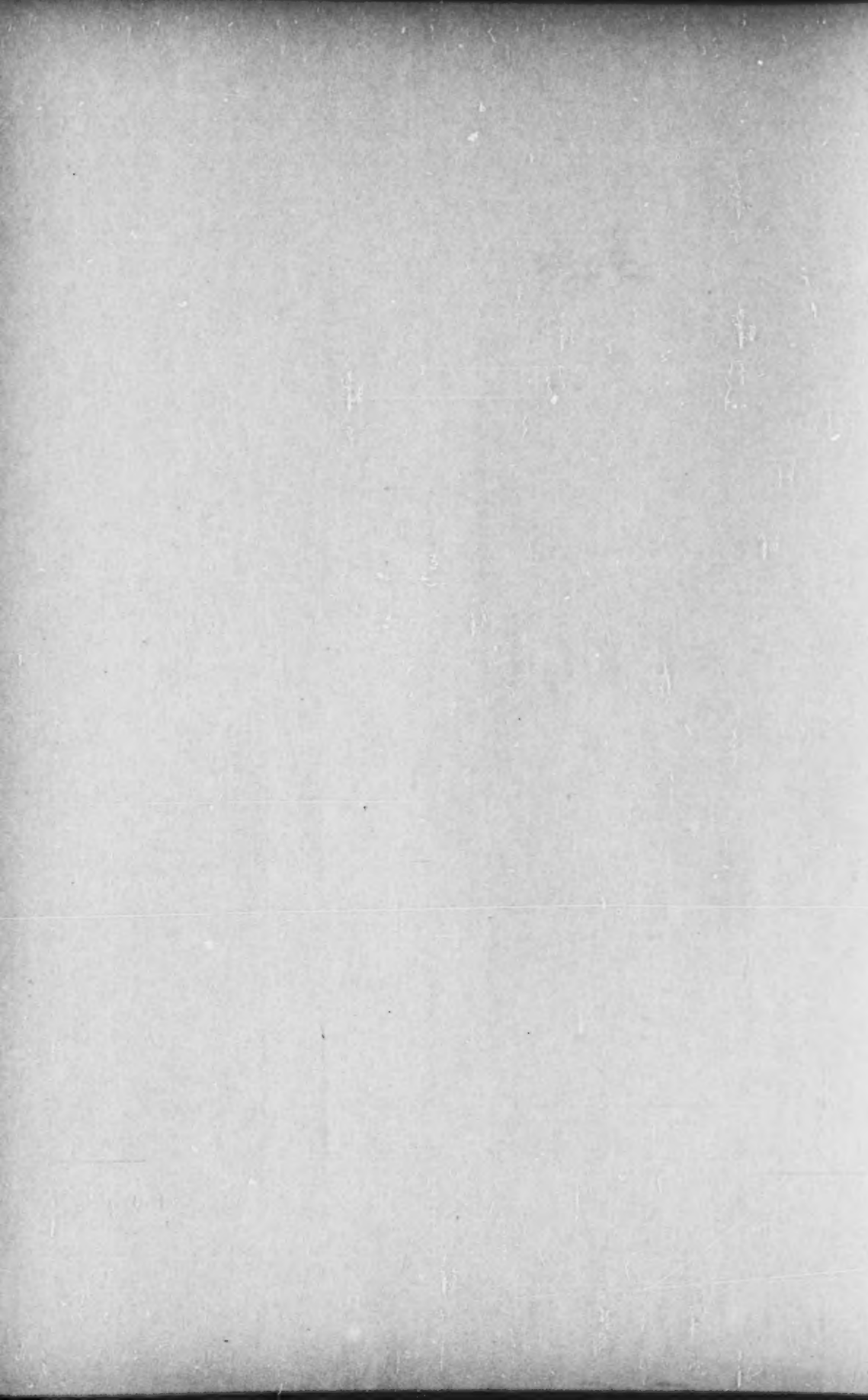
RESPONDENTS' BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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MAY 1990

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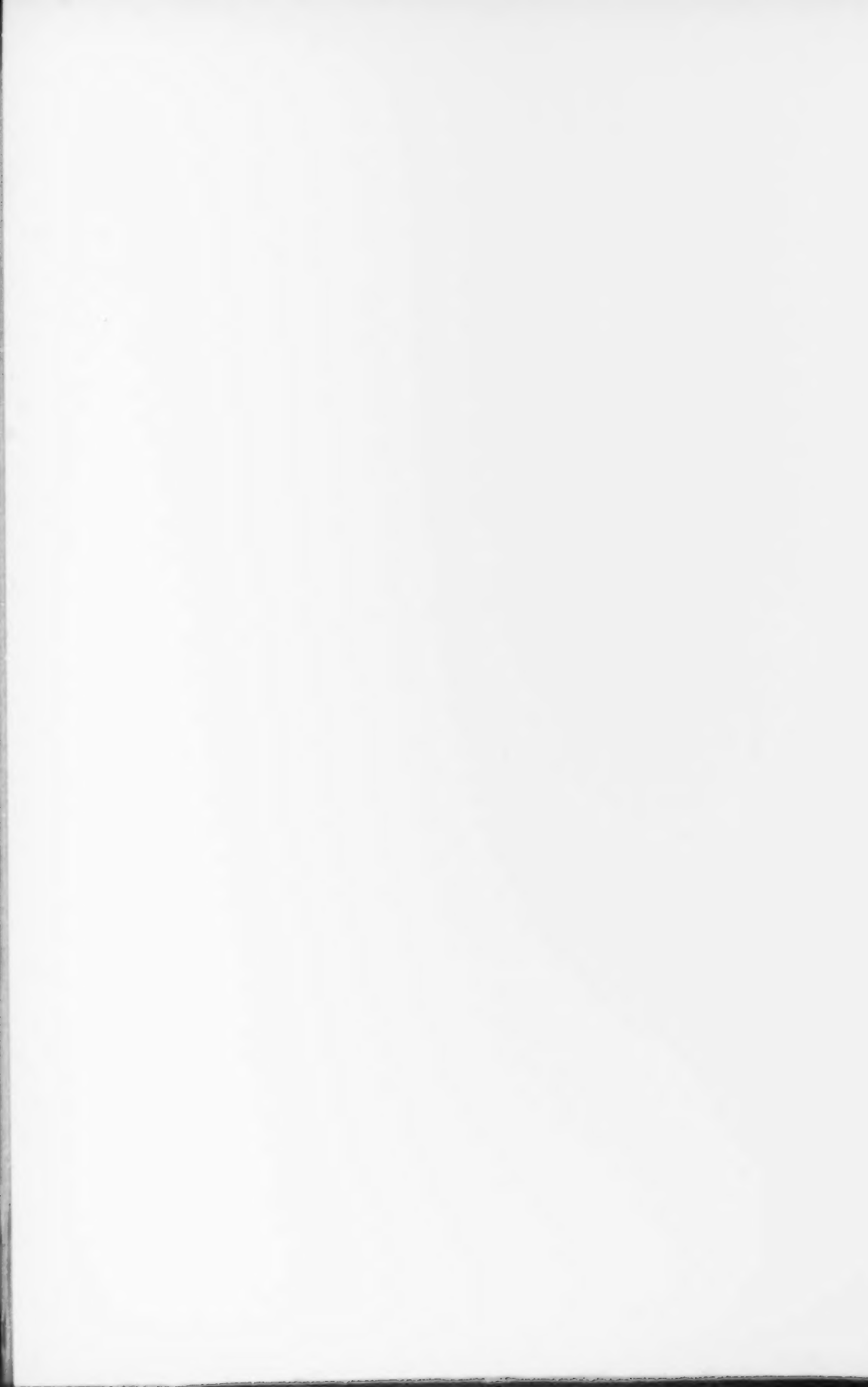


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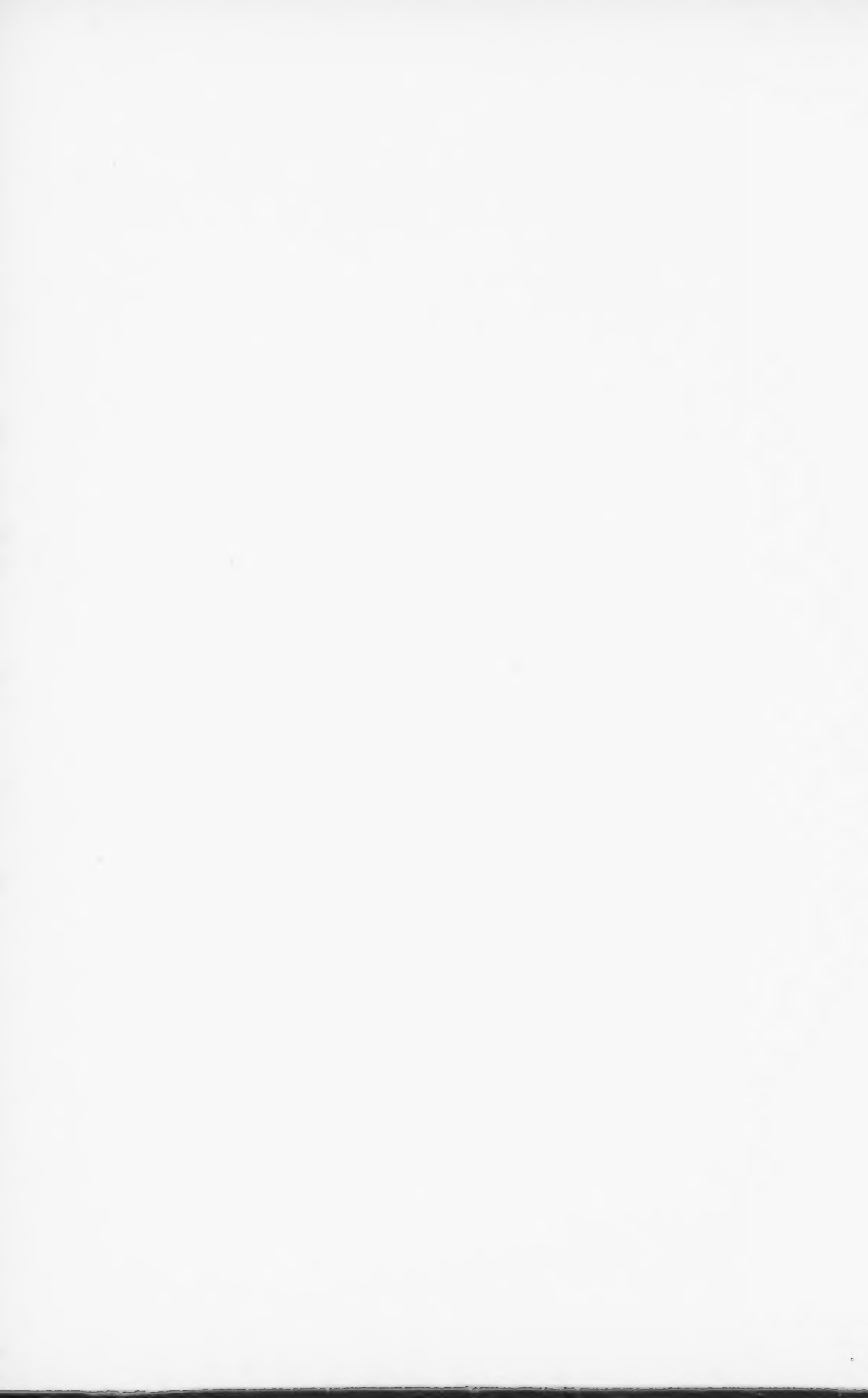
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CITY OF MOORE, OKLAHOMA, MOORE PUBLIC  
WORKS AUTHORITY; ROBERT SWANAGON,  
INDIVIDUALLY AND AS CITY MANAGER OF THE  
CITY OF MOORE, OKLAHOMA, AND MANAGER OF  
THE MOORE PUBLIC WORKS AUTHORITY; ODELL  
MORGAN, INDIVIDUALLY AND AS CHAIRMAN OF  
THE PERSONNEL BOARD OF THE CITY OF MOORE,  
AND CHARLES THOMPSON, INDIVIDUALLY AND AS  
MEMBER OF THE PERSONNEL BOARD OF THE CITY  
OF MOORE, OKLAHOMA, RESPONDENTS.

RESPONSE OF THE CITY OF MOORE, OKLAHOMA,  
MOORE PUBLIC WORKS AUTHORITY, ROBERT  
SWANAGON, ODELL MORGAN AND CHARLES  
THOMPSON TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Steve Estes, has  
invited this honorable Court to grant a  
certiorari review of the Tenth Circuit  
Court of Appeals' opinion in favor of the  
Respondents and denial of his Petition for



Rehearing. Respondents oppose Petitioner's Request and would show the Court that the arguments advanced by the Petitioner are factually and legally insufficient and certiorari should be denied.

#### INTRODUCTION

In his attempt to inspire certiorari review by this Court of the Tenth Circuit's opinion and denial of Petitioner's Motion for a Rehearing, Petitioner fashions arguments premised upon both misstatement of fact and misperception of law. These are addressed below.

#### FACTUAL STATEMENT

Counsel for the Respondents would advise the Court that Petitioner's Brief asserts facts containing several



misstatements and omissions of fact. The following factual omissions and misstatements are identified pursuant to Rule 15.1 of the Rules of the Supreme Court:

A. OMISSIONS

1. Prior to May 7, 1987, Petitioner Steve Estes was part-time Assistant City Attorney for the City of Moore, Oklahoma.
2. On May 7, 1987, Respondent Robert Swanagon, acting in his official capacity as City Manager, exercised his right, pursuant to Section 2-73 of the City Code, to convert the office of City Attorney from a part-time consultant basis to that of a full-time salary based City Attorney's office.
3. Petitioner was notified on May 7, 1987 that as a result of this reorganization his professional





services were to be discontinued pursuant to the Moore City Charter, Section 8-1.

4. Petitioner's release from employment was solely and directly caused by the restructuring of the City Attorney's office.
5. Petitioner Estes could be terminated "for the good of the service".

#### B. MISSTATEMENTS

In addition to Petitioner's omission of certain facts, Petitioner also misstated several facts:

1. Petitioner, Steve Estes, as a part-time Assistant City Attorney was not a "classified" employee of the City of Moore, and not therefore entitled to any due process proceedings. (See Trial Court's Order Granting Summary Judgment, cited



in Petitioner's Brief,  
p. 38.)

2. Unsatisfactory work performance or misconduct is not the only permissible basis for the discharge of a municipal employee where, as in this case, the City Charter specifically and expressly provided the City Manager the right to restructure the City Attorney's office. (Id. at p. 40; Moore City Code, §§ 2-71 and 2-73, attached as Exhibit "A".)
3. Petitioner's assertion that "Swanagon simply summarily fired Petitioner and hired his own personal attorney at a substantially greater salary than that paid Petitioner" is unsupported by the record, void of any support and is being raised improperly for the first time in this Petition for a writ of certiorari. (Petitioner's Brief in



Support of Application  
for Writ of Certiorari,  
p. 11, ¶ 2.)

The foregoing omissions and misstatements of fact, however, are not essential to a proper disposition of this case. Even assuming the facts asserted by Petitioner are correct, federal and state law dictate that Petitioner did not have a property interest in continued employment and that the rulings below are correct.

STATEMENT OF THE CASE

The Petitioner, Steve Estes, a former part-time Assistant City Attorney for the City of Moore, Oklahoma was released from employment on May 7, 1987, when the office of City Attorney was restructured from a part-time consultant



basis to a full-time salaried position. Petitioner brought suit against the Respondents alleging he was wrongfully discharged and on April 29, 1988, Petitioner filed his Complaint alleging a claim under 42 U.S.C. § 1983 and other pendant state claims.

On February 21, 1989, the United States District Court for the Western District of Oklahoma granted Summary Judgment in favor of Respondents. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit and the trial court's Order was affirmed on November 22, 1989. Petitioner then filed a Petition for rehearing on December 5, 1989, which was denied by the Tenth Circuit in an Order filed January 5, 1990.





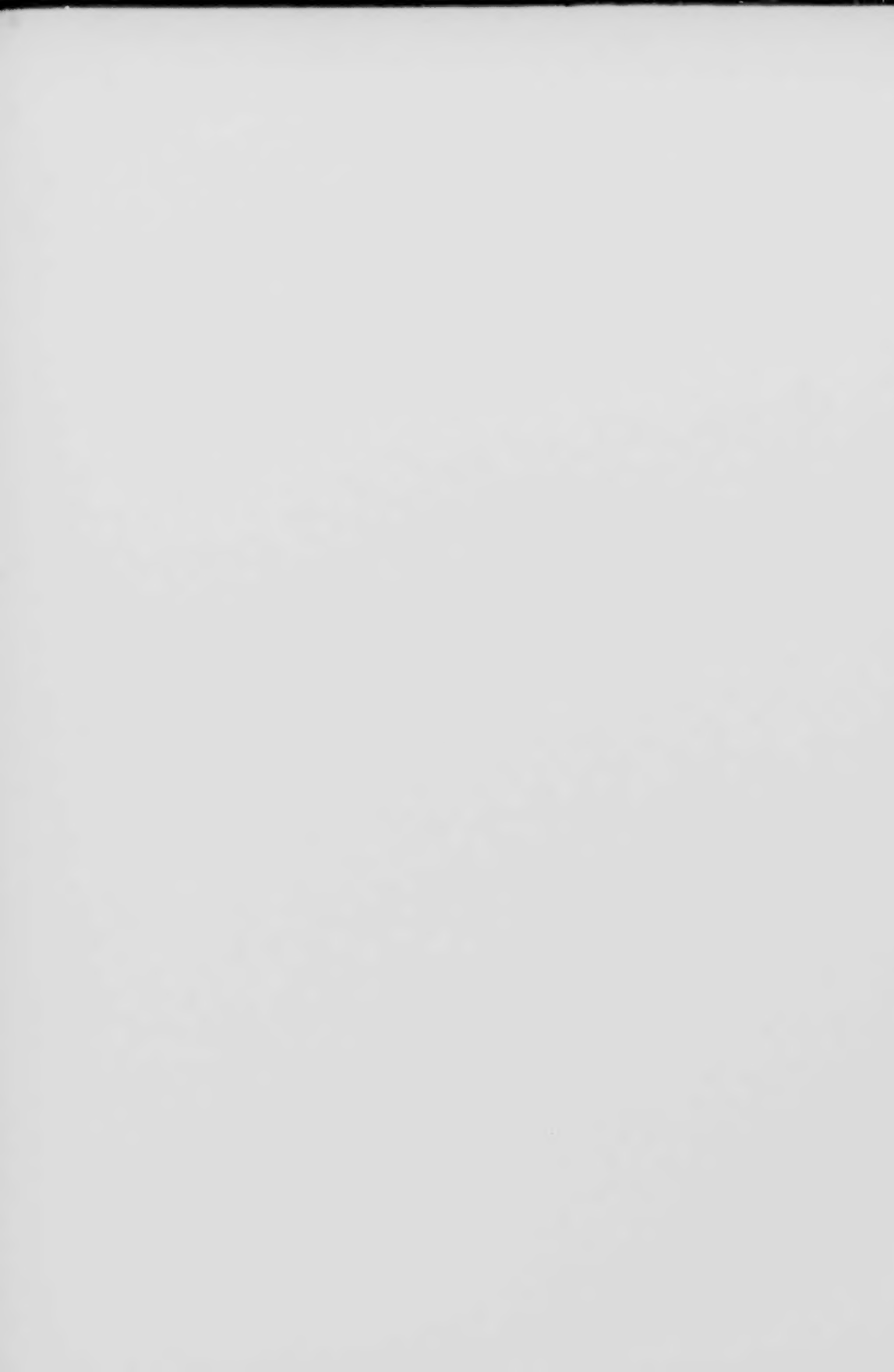
On April 2, 1990, Petitioner served Respondents his "Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit" and in Response and Opposition, Respondents have respectfully submitted this Brief.

ARGUMENTS AND AUTHORITIES

PROPOSITION I

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, INFRA, OR BOARD OF REGENTS v. ROTH, INFRA.

Petitioner bases his entire argument on two fundamentally flawed presuppositions: (1) that Petitioner was a "classified" municipal employee; and (2) that Oklahoma law confers a property interest to Petitioner since the Municipal



Charter provides some employees are entitled to post-termination notice and review of adverse personnel decisions. His erroneous conclusions result from a misunderstanding of: (1) the City's Charter provision, Section 8-3, concerning "classified" employees, (2) the City's employment guidelines regarding grounds for discharge; and (3) a misinterpretation of these provisions under the holdings in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985), and Board of Regents v. Roth, 408 U.S. 564 (1972). Petitioner's obvious intent is to show that the Tenth Circuit's decision in the case below is in conflict with previous applicable decisions of this Court. Nevertheless, when objectively analyzed, it is readily



apparent that there is no conflict between the Tenth Circuit's decision in this case and either Loudermill or Roth.

Petitioner, in conclusory fashion, refers to his former position as part-time Assistant City Attorney as a "classified" municipal employee, pursuant to Section 8-3 of the City Charter. Without support for this position he reasons he is therefore entitled to full due process proceedings prior to any disciplinary actions or discharge. The court below rejected this argument opining:

With little or no record support, the plaintiff asserts that he is a classified employee, entitled to the benefits of Charter Sections 8-3 and 8-4. Affidavit of Steve Estes ¶ 5. Even if the Court credits the plaintiff's



assertion on this point, his property interest contention fails.

(Trial Court's Order, p. 6, ¶ 1, cited in Petitioner's Brief, p. 38.) Not only is Petitioner's claim insufficiently supported, it is immaterial. Both the trial court and the Tenth Circuit provided Petitioner with every available benefit of doubt, but properly concluded that even if he was considered a "classified" municipal employee, the City Charter merely entitled such employees "to post-termination notice and review of adverse personnel decisions" and did not grant him an expectancy of continued employment. Id. at p. 39. Accordingly, Petitioner's assertion that his purported status as a "classified" employee for the City of Moore is not





determinative of the critical issue of whether Petitioner had a legitimate expectation of continued employment.

Petitioner's second misapplication of the relevant law concerns the City's Guidelines regarding the specific grounds for discharge: "that the only permissible bases (sic) for the discharge of an employee are (sic) unsatisfactory work performance or misconduct." (Petitioners Brief, p. 11, ¶ 1). Petitioner summarily concludes that such protection creates a property interest that dictates the necessity of due process protections prior to any discharge. Petitioner's rationale fails, however, in the wake of Loudermill, infra, and Roth, infra. As properly recognized by the Tenth Circuit Court of



Appeals, to establish his Section 1983 due process claim, Petitioner must show that he had a property interest protected by the Fourteenth Amendment. In the employment context, the required interest is a "legitimate expectation of continued employment". In Board of Regents v. Roth, 408 U.S. 564, 578 (1972), this Court expressly defined the standard to determine the existence of a constitutionally protected property interest:

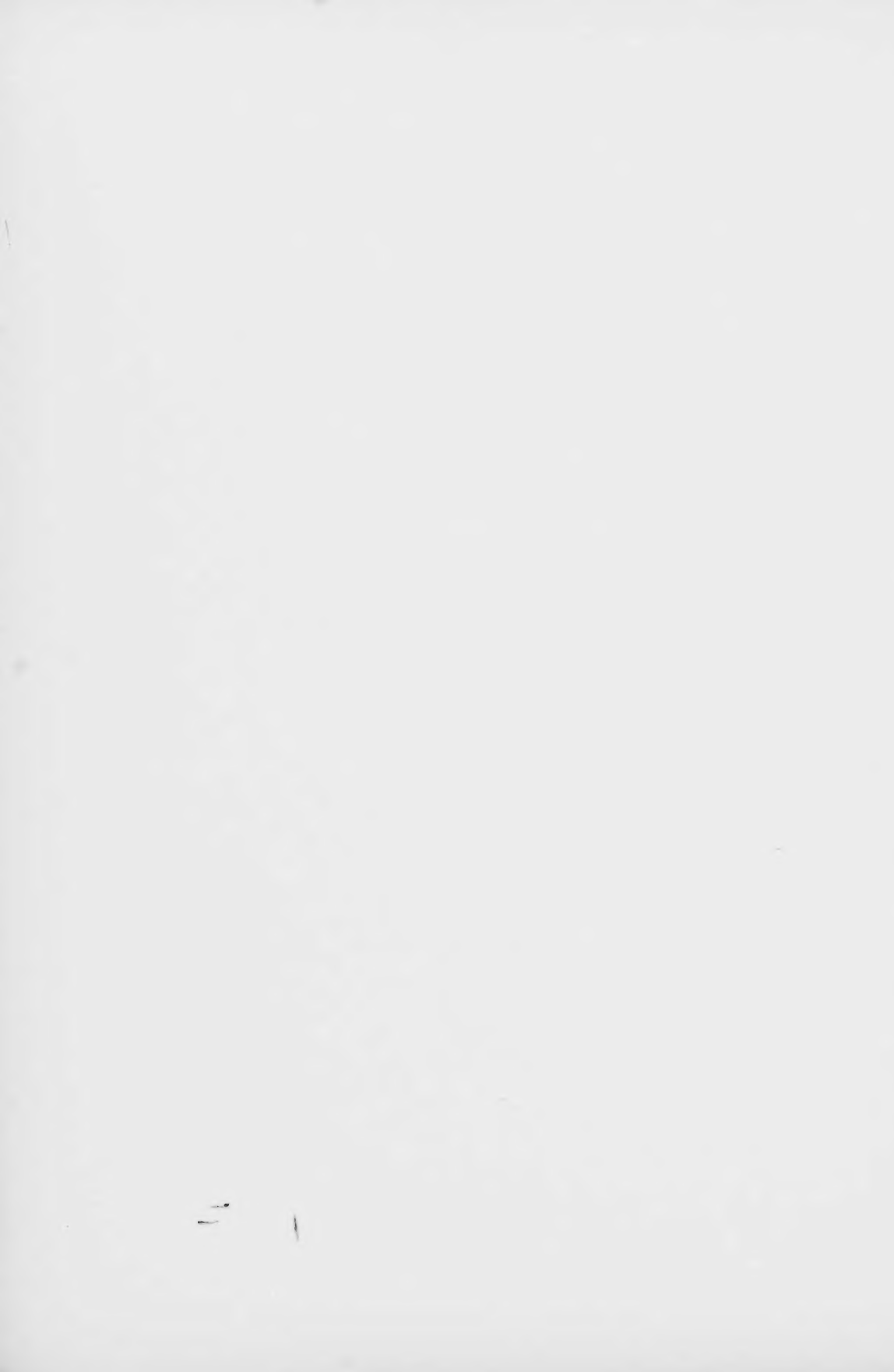
To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

In determining the existence of a protected property interest, the Court



relies on state law. Roth, supra, at 578; Bishop v. Wood, 426 U.S. 341, 345-47 (1976). In the present case, Petitioner offered no evidence that his status was anything other than an employee at-will. Accordingly, as an employee at-will under Oklahoma law, he was terminable at any time with or without cause, and Petitioner did not and could not have a "legitimate claim of entitlement" to continued employment. See Hinson v. Cameron, 742 P.2d 549 (Okla. 1987).

The Trial Court properly construed the facts in the light most favorable to the Petitioner and expressly held Petitioner's reliance on Section 8-4 of the Moore City Charter, even if applicable,



"cannot confer a property interest". (Trial Court's Order, p. 6, ¶ 1, cited in Petitioner's Brief, p. 38) (emphasis added.)

In the present case, contrary to Petitioner's contentions, the opinion by the Tenth Circuit is fully consistent with the previous decisions of this Court. While Petitioner has urged this Court to consider the facts in the present case as similar to those in Loudermill, infra, there is a fundamental factual distinction; in Loudermill the state law provided employees were entitled to a property interest in their employment. Oklahoma law offers Petitioner no such solace, and his reliance on Loudermill is erroneous and misplaced.





## PROPOSITION II

THE TENTH CIRCUIT'S DECISION PROPERLY INTERPRETED OKLAHOMA STATE LAW WHICH PROVIDES "REMOVALS FOR THE GOOD OF THE SERVICE" DOES NOT CONFER A PROPERTY INTEREST IN CONTINUED FUTURE EMPLOYMENT.

Petitioner also challenges the Tenth Circuit decision as contrary to pertinent Oklahoma law. Petitioner's contention is, however, based solely upon his own subjective belief that the "entire personnel classification plan" and employment guidelines "are 'terms of employment' that the employees of the City are entitled to rely upon and which vest them with a legitimate expectation that they will continue in employment." (Petitioner's Brief, p. 20-21.) Petitioner cannot, however, support this unilateral



expectation with any legal authority.  
There simply is none.

Significantly, the Court squarely considered Petitioner's claim based upon language in the City Charter which provided "removals, demotions, suspensions, and layoffs shall be made solely for the good of the service". (Trial Court's Order, p. 4, ¶ 1, cited in Petitioner's Brief, p. 34) (emphasis in Order). The Court held:

Construing Oklahoma law, both state and federal courts have held that the underscored language does not confer a property interest on employees. See Graham v. City of Oklahoma City, 859 F.2d 142, 146 (10th Cir. 1988); Meder v. City of Oklahoma City, 672 F. Supp. 500, 501-02 (W.D. Okla. 1987); Hall v. O'Keefe, 617 P.2d 196, 198-200 (Okla. 1980).

Id. at pp. 34-35.



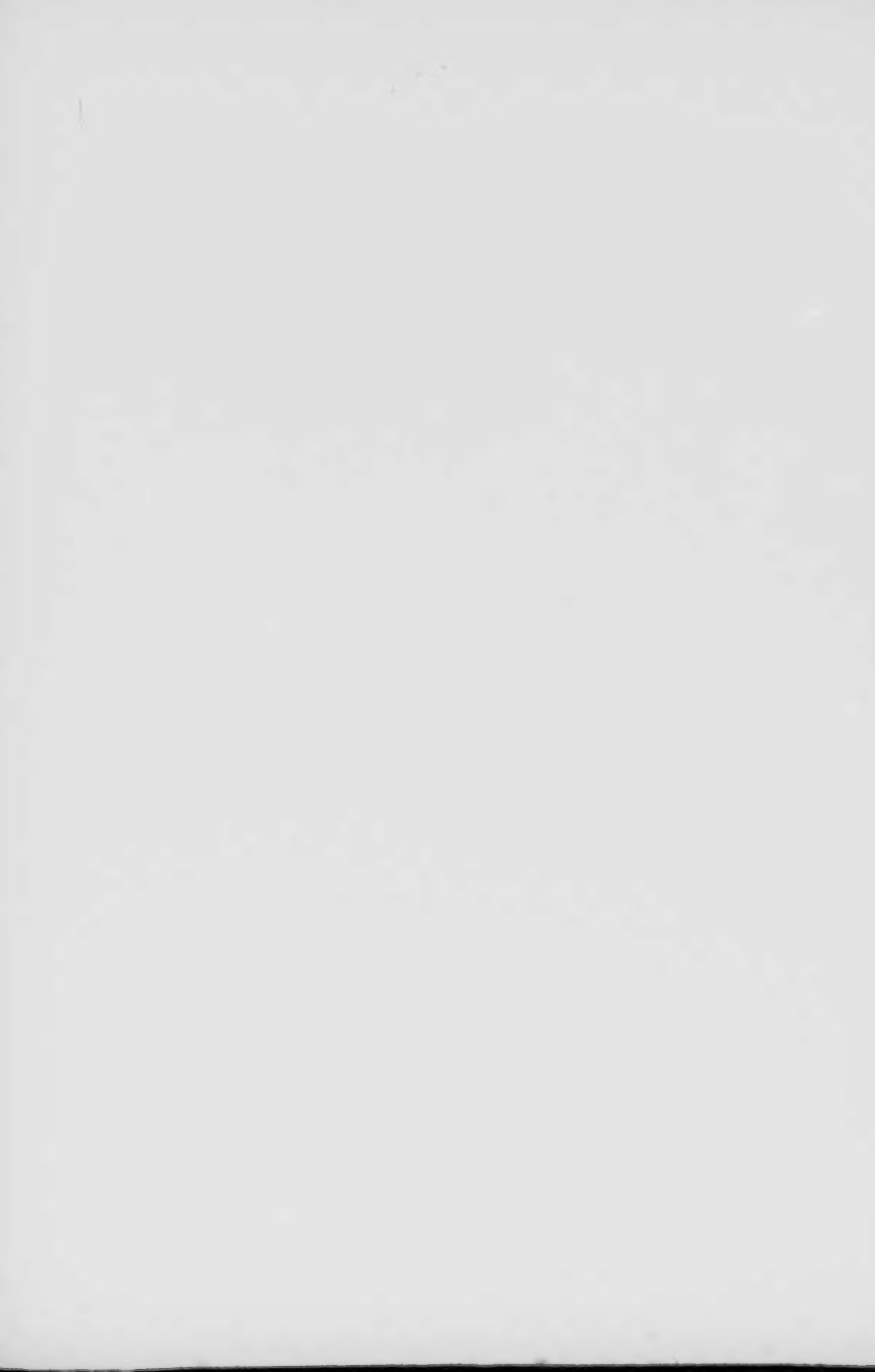
Petitioner also boldly asserts that the personnel rules of the City of Moore create a property interest. In an attempt to construct some type of foundation to support this contention, Petitioner suggests the Rules "constitute a legislative and regulatory plan for employee protection . . . against removal except for cause." (Petitioner's Brief, p. 20-21.) Petitioner then cites Vinyard v. King, 728 F.2d 428 (10th Cir. 1984), and selectively quotes language that states "a public employee may have a 'sufficient expectancy of continued employment to constitute a property interest . . . .'" (Petitioner's Brief, p. 12) (citing Vinyard, supra). The frail underpinnings



of Petitioner's argument crumble upon closer examination.

The trial court expressly considered Petitioner's claims regarding the personnel rules of the City of Moore and held:

The plaintiff Estes' reliance on the personnel rules of the City of Moore is also misplaced. To be sure, viewed in isolation, a city's personnel rules or guidelines may create a sufficient expectation of continued employment to invoke the protections of the due process clause. See Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984). However, in the instant case, the Charter of the City of Moore empowers the city manager to discharge employees "for the good of the service." As discussed above, this Charter language vests the City Manager with a wide range of discretion





in making personnel decisions. Such Charter-based discretion cannot be effectively circumscribed by personnel regulations and the like. As the Tenth Circuit noted in Graham: "Under Oklahoma law, where certain terms of employee dismissals are explicitly stated in the city charter, the City Manager or other city officials are not authorized to alter or otherwise restrict these terms so as to legally bind the city." 859 F.2d at 146; . . . . Thus, the personnel rules and regulations of the City of Moore could not give the plaintiff Estes what the Charter expressly denied him, a property interest in continued employment.

(Trial Court's Order, p. 7, ¶1, cited in Petitioner's Brief, pp. 40-41) (citations partially omitted). Similarly, the Tenth Circuit expressly considered Petitioner's claim under the personnel rules and held



Graham, supra, was controlling. (Tenth Circuit's Order, p. 2, ¶ 1, cited in Petitioner's Brief, p. 26.) Accordingly, Petitioner's reliance on the personnel rules collapses under its own weight.

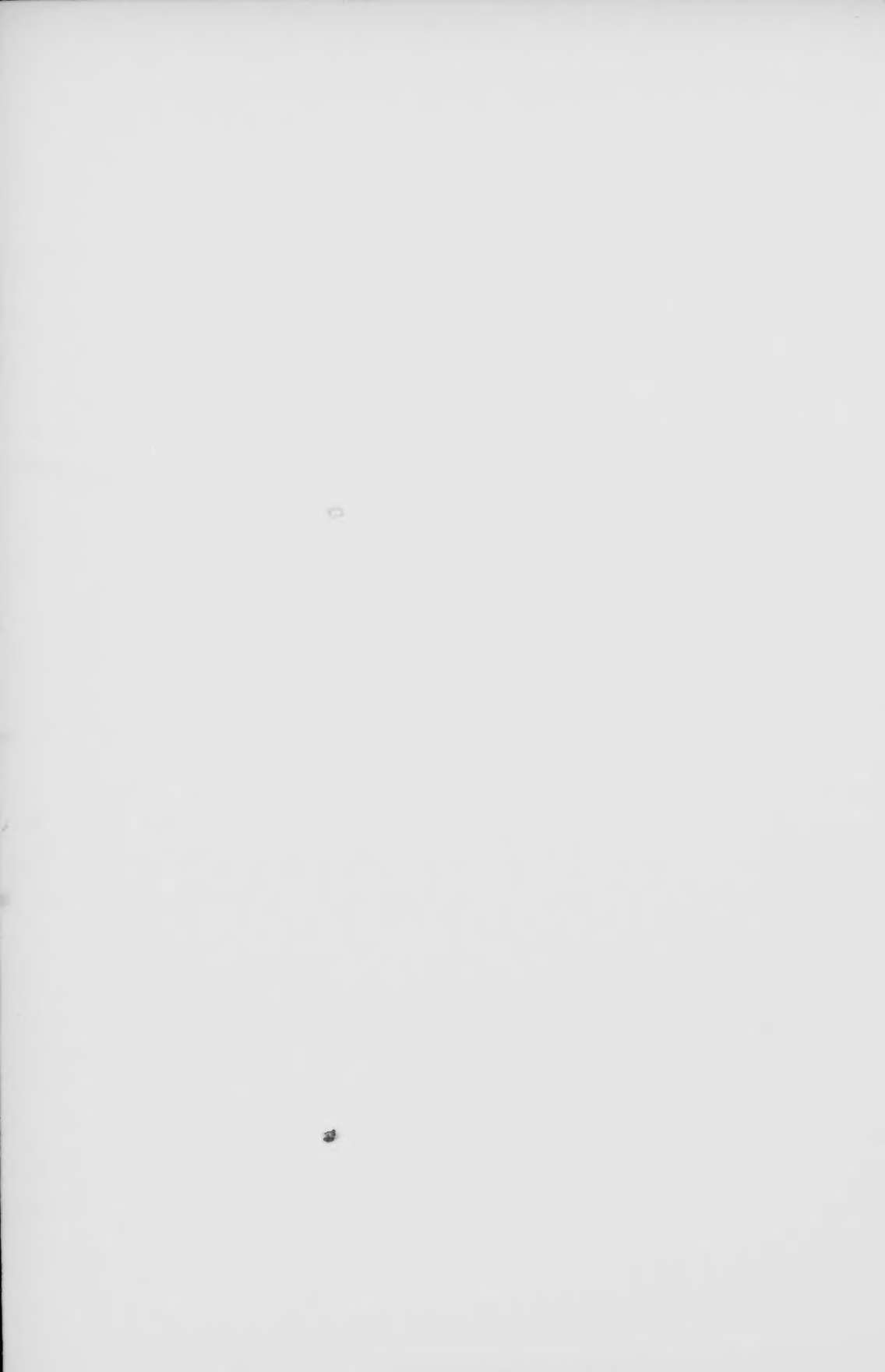
Petitioner also challenges the inherent power of the Moore City Council vis-a-vis the Moore City Manager. Petitioner blithely suggests that neither the trial nor the appellate court addressed the relative powers of the Council and Manager in personnel matters. He argues that the Council enacted ordinances (as expressions of "policy") which circumscribe the charter-bestowed power of the City Manager to appoint and remove personnel. Contrary to Petitioner's suggestion, both courts below addressed this question:



. . . the Charter of the City of Moore empowers the city manager to discharge employees "for the good of the service." . . . Such Charter-based discretion cannot be effectively circumscribed by personnel regulations and the like.

(Trial Court's Order, p. 7, ¶ 1, cited in Petitioner's Brief, p. 40.) For purposes of these issues the City Charter reigns supreme and under Oklahoma law where the Charter explicitly sets forth the power of the City Manager regarding dismissals, it cannot be gainsaid by a council-authorized personnel rule.

Despite Petitioner's best effort, there has been no showing that the Tenth Circuit improperly interpreted or applied Oklahoma law and certiorari must be denied.



PROPOSITION III

PETITIONER HAS WHOLLY FAILED  
TO ESTABLISH ANY REASON  
JUSTIFYING A REVIEW OF THE  
TENTH CIRCUIT'S ORDER BELOW  
ON A WRIT OF CERTIORARI.

Rule 10 of the Rules of the Supreme Court expressly dictates the predicate foundation necessary to justify this Court's exercise of its inherent judicial discretion to grant Petitioner a review of the Tenth Circuit's Order below on a writ of certiorari. Sup. Ct. R. 10 (effective January 1, 1990). While not comprehensive, Rule 10 sets out the type of compelling reasons justifying a review of a circuit court's order on a writ of certiorari. Those reasons can be summarized as follows:

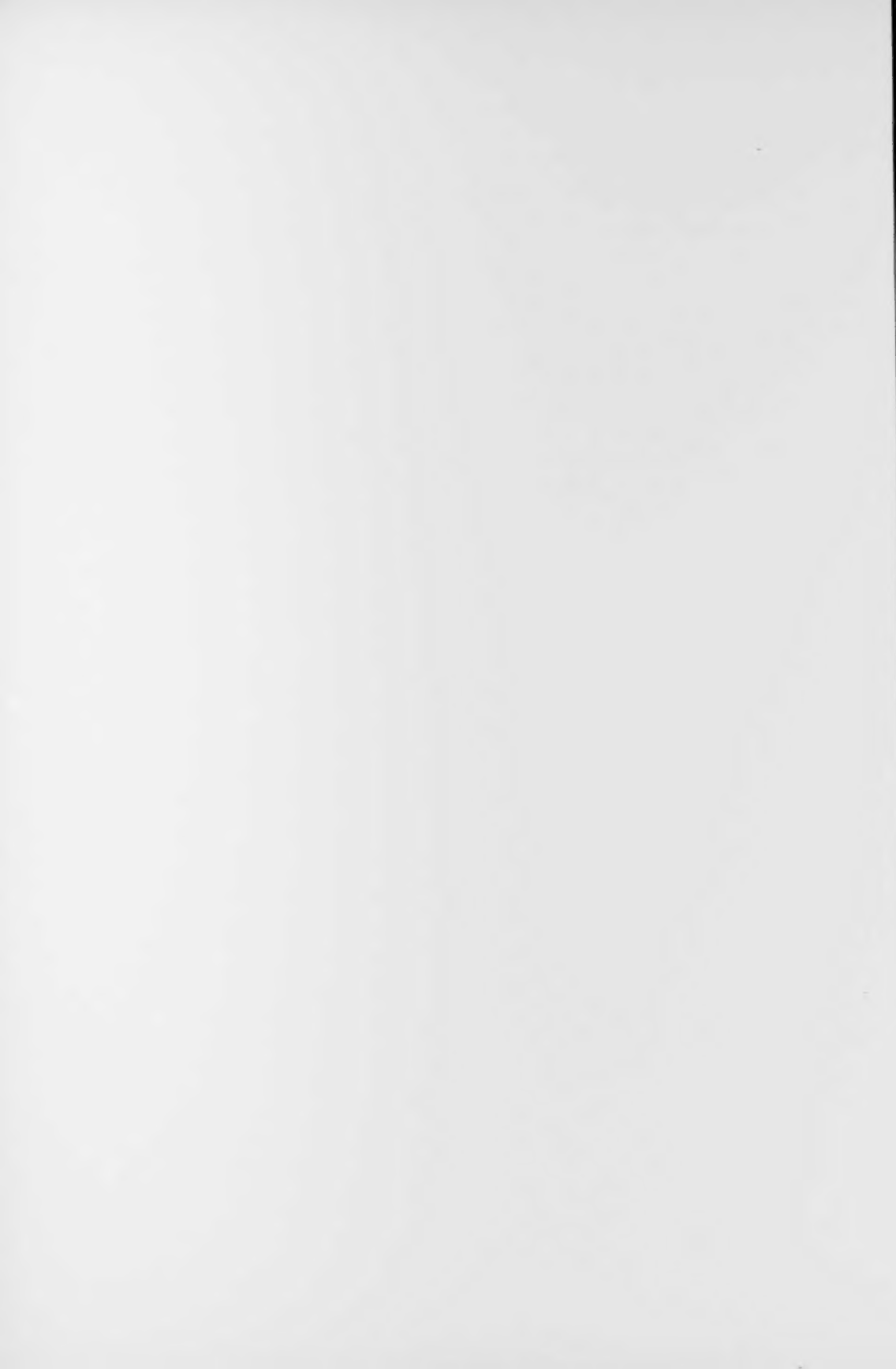




- (1) A United States Court of Appeals Decision is in conflict with:
  - (a) Other Courts of Appeals;
  - (b) Applicable Decisions of the Supreme Court; and
  - (c) A Decision of a state court of last resort.
  
- (2) A United States Court of Appeals Decision on a Federal question:
  - (a) Should be settled by the Supreme Court;
  - (b) In conflict with decisions by the Supreme Court; and
  - (c) In conflict with a state court of last resort decision.
  
- (3) A United States Court of Appeals has sanctioned as lower court or itself departed from the accepted and usual course of judicial procedures.



See Sup. Ct. R. 10(a), (b) and (c). As described above, Petitioner's only arguable justification for inviting this Court to grant a writ of certiorari is that the Tenth Circuit's Order is in conflict with this Court's previous decisions concerning property interests in the context of an alleged wrongful discharge and/or the Tenth Circuit Court improperly interpreted Oklahoma State law concerning when a Municipal Charter and/or personnel rules confer a property interest protected by the Constitution of the United States. Nevertheless, for the reasons previously set forth, Petitioner has wholly failed to show any such conflict or other such special and important justification.



Accordingly, Petitioner's invitation for certiorari should be denied.

#### CONCLUSION

A review on a writ of certiorari is not a matter of right but rather, a matter of judicial discretion founded upon a special showing of important reasons critical to the continued enforcement of the guarantees of the Constitution of the United States. Accordingly, only material and genuine petitions for certiorari can be considered and accepted. Petitioner's Application does not satisfy this high standard.

The Tenth Circuit opinion is both well-reasoned and well-supported and clearly shows that the applicable federal and state law was properly applied to the



undisputed facts resulting in the failure of Petitioner's claim. Moreover, the absence of any special and important reason in support of this Petition for Certiorari further demonstrates the propriety of denying it. The Court should reject this Petition and leave the opinion of the Tenth Circuit undisturbed.

Respectfully submitted,

---

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CERTIFICATE OF MAILING

On this \_\_\_\_\_ day of May, 1990, a true and correct copy of the above and foregoing instrument was mailed, with postage prepaid thereon, to:

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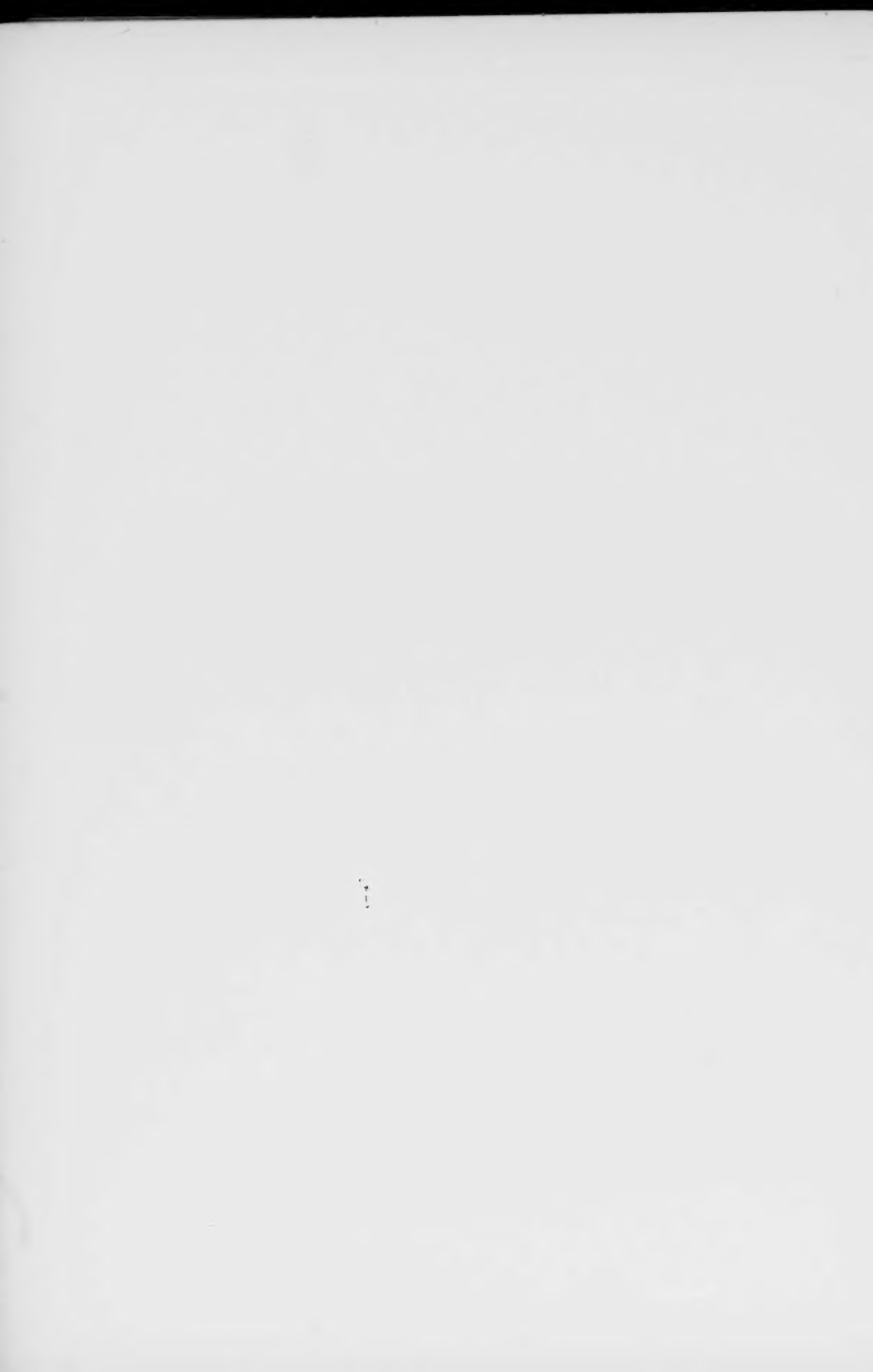
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## APPENDIX "A"

### Sec. 2-71. City attorney, office.

There is hereby created the office of city attorney, who shall be a person of good moral character, licensed to practice law in the state, who shall be appointed by the city manager.

(Code 1973, § 1-33)

### Sec. 2-72. Duties and compensation.

It shall be the duty of the city attorney to advise the city council and all city officers in the performance of their duties. He shall appear, prosecute and defend all actions wherein the city is a party. He shall perform such other professional services as may be required of him by the city manager or council, for such compensation as shall be fixed by the city manager.

(Code 1973, § 1-34)

Cross reference--Municipal court and judge, Ch. 15.

### Sec. 2-73. Other business.

The city attorney shall be entitled to engage in the private practice of law to the extent that the same does not interfere with or conflict with his duties as city attorney, and such attorney may be retained on a part-time or consulting basis, as the city manager determines.

(Code 1973, § 1-35)